No. 11,630

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

B. SAMUELS,

Appellant,

vs.

UNITED SEAMEN'S SERVICE, INC., a non-profit organization,

Appellee.

APPELLANT'S CLOSING BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Appellant will follow the outline adopted by appellee herein to present in logical sequence her reply to the additional contentions raised.

STATEMENT OF FACTS.

At page 2 and frequently in the course of its brief appellee makes mention of the fact that the lease in question was prepared by appellant. This is conceded, but it is also important to remember that the lease was first submitted to and approved by the local office of appellee, which then transmitted the lease to its head office and legal department, and that certain changes were suggested and made. (Tr. p. 55.) The

language defining the term of the lease was apparently satisfactory, as no question was raised with reference thereto at that time or until the local office sought approval of an extension of the term after the expiration of six months from the V-J date. (Tr. pp. 63-65.)

Appellee also states at page 2 that appellant did not raise the question of termination until March of 1946, whereas Mr. Fazackerley testified (Tr. p. 48) that the subject was discussed early in that year, Mr. Philbrick testified that Mr. Meyer discussed the subject about February or March, and at page 63 he stated that it was prior to March 1 that the discussion arose. This logically supports appellant's consistent position as to her construction of the lease. In other words, this question was not raised as an afterthought long after the expiration date, but appellant took the position that September 1 (the actual date of the formal surrender) was the date from which the six month period would be computed, although appellant earnestly believes that her rights commenced on August 14, the date when hostilities actually ceased.

ARGUMENT.

Appellant has no quarrel with the statements of appellee on pages 6 to 10 under the above heading, but seriously questions their applicability to the situation in hand. It is appellant's contention that the language used in the lease is not open to construction, but that it is simple and plain and susceptible of but one

interpretation. She believes that there can be no doubt as to the meaning of the clauses in the lease so that the rule of construction against the scrivener or lessor cannot be applied. There being no testimony showing conflict as to the meaning of the language or any special understanding of the parties, there is nothing left to do but to apply the law in construing the actual words employed, and hence there is no reason to adopt the rule contended for by appellee. There is no existing conflict in the lease itself, or to be drawn from the facts, which creates any uncertainty in ascertaining the meaning of the actual words appearing in the lease. Accordingly, there is no reason for construing the language against any person, but the duty of the Court is to give the language used its ordinary and accepted meaning, which is all that appellant is endeavoring to do.

The long excerpt from the opinion in *Glenn v. Bacon* (86 Cal. App. 58, 260 Pac. 559) appearing at pages 9 et seq. of Brief for Appellee, clearly illustrates the difference in the problem there presented and the one here involved. There an ambiguity was created by a conflict in the terms of the lease itself. There is in this instance only the matter of interpreting specific language used, and not any problem of making such language agree with any other terms employed.

AS TO THE TRIAL APPELLANT'S EXPECTATION OF PROOF AND APPELLANT'S ACTUAL PROOF.

Under the above headings, from page 10 through 17, appellee advances contentions the applicability of which to the situation in hand appellant is unable to follow. The action brought is one for declaratory relief, requesting the Court to construe the meaning of language used in the lease. She alleges her construction and that claimed by the defendant and asks the Court to determine the matter. Obviously the only proof which is necessary for her to make is that a lease containing the disputed language was actually executed. This she did, and was entitled to rest her case. The pleading of the appellee indicated a divergence in the construction of the language used, and hence the issue was met by the introduction of the document containing the language in question. The failure of Mr. Meyer to testify is of no consequence inasmuch as the situation is merely left with the proof adduced by the defendant, to wit, that no discussion at all arose over the clause in the lease as to which the disagreement now exists.

The numerous authorities cited at pages 14 to 17 of appellee's brief are impressive, but none of these decisions is applicable to the situation here presented. They all involved situations where conduct of the parties or other evidence was available to establish the opposing positions of the litigants. We have none of that here. Both parties are in accord as to what happened and as to the very language used, but defendant is now attempting to apply some technical

construction of its own to the very simple and clear terms of the lease to distort its meaning. Obviously, if this litigation had been foreseen, other language could have been used to avoid the contentions now urged, but, just as clearly, appellee was in position to demand a clarification before executing the lease to establish beyond equivocation the contentions which it now urges. If other language had been employed, undoubtedly different arguments would now be advanced by appellee. Appellant sincerely believes that it would be difficult to employ simpler language to convey the meaning now urged by her in the construction of this lease. It is respectfully urged that the opinion of the Court below indicates that the issue was properly raised, and the decision itself, although adverse to the plaintiff, clearly shows that the Court considered that only a question of law was presented and that the Court disagreed with appellant's contentions. A clearer case of meeting the issue can hardly be imagined.

AS TO POSSIBLE TERMINATION OF LEASE BY ACT OF THE PARTIES OR OPERATION OF LAW.

At pages 17 to 20, under the above heading, appellee again advances cogent arguments and cites numerous authorities upon points not even remotely involved in this litigation. It mentions the eleventh paragraph of the lease, permitting lessor to erect signs. There was no testimony upon this matter whatsoever. Quoting from the sixteenth paragraph, appellee mentions

that a provision is contained that notices required by the law or by the lease are to be given in a certain manner. It is respectfully urged that no notice of termination was required in this case by the terms of the lease or by law. The question of whether or not the lease has expired is the matter being presented to this Court for determination. Appellee also cites from paragraph twenty-third, providing that the *lessee* may give a notice of termination. Appellee states that "Appellant neither gave nor served any such notice". A reading of the paragraph indicates that this notice was one for the benefit of the lessee, and appellee was the party entitled to give such notice and not the appellant. There is no question but that when a lease provides for the giving of notice of termination, such provision is binding, and authorities to that effect cited by appellee establish nothing here, as no notice was necessary under the lease.

The record clearly shows (Tr. pp. 64, 69) that the parties had been discussing an extension of the term of the lease to December 31, 1946, and that this was covered by a writing acceptable to the local office of appellee and sent to its New York office, and upon the opinion of the New York attorneys for appellee this whole controversy became crystallized. There was accordingly no need to take any action by way of terminating the lease, as the parties had knowledge of the contentions raised by appellant in that regard.

As to the payment of rent by appellee as stated on page 20, nothing appears in the testimony to this effect, but the fact is that the rent was paid by ap-

pellee and accepted by appellant reserving full rights and without prejudice to the rights or positions taken by either party.

AS TO DETERMINATION OF WAR OR PEACE.

Commencing at page 20 of its brief, appellee begins to treat the real question involved in this matter. The authorities cited, however, are not decisive of the question here presented. Appellee apparently overlooks the fact that we have in this case a simple contract between parties providing for a lease to terminate six months after the cessation of hostilities in the war with Japan. The construction of this language is a matter of merely applying logic and reasoning to the words employed. The power of the President or Congress to declare cessation of hostilities or the ending of the war as political matters have nothing to do with determining what the parties meant by the simple words appearing in the contract executed by them. If the words "termination of war" had been used, appellant would concede that, in the absence of a special agreement or some circumstances showing a different construction by the parties, she would be in no position here to claim that the lease had even yet expired, but when the word "war" is preceded by the words "cessation of hostilities", then this attempted clarification should be given such reasonable and logical construction as to give working effectiveness to the clause as a whole. It is not necessary to determine when the powers of Congress or the

President may be exercised under limited acts giving either the power to terminate certain functions by making certain formal declarations. Naturally, if the termination of authority or the effectiveness of a statute depend upon certain action to be taken by the President or by Congress, such action is a prerequisite to such termination of authority or effectiveness of such statute. Such is not, however, the situation here presented. In this case the lease provides for its termination six months after the cessation of hostilities in the present war with Japan. It does not mention that this termination is to be determined by some prior declaration to that effect by the President of the United States or by Congress, and therefore the words must be given their normal construction that the lease is to terminate "when the shooting stops". This does not abuse the language used, but gives to each word its full measure of meaning and application in construing the document executed.

Proceeding to the cases cited by appellee, appellant presents the following thumbnail analysis demonstrating their inapplicability.

The first case cited is *United States v. Oglesby Grocery Co.* (1920), 264 Fed. 691. This case was reversed by the Supreme Court of the United States (255 U.S. 108; 65 L. Ed. 535) on the basis of *United States v. Cohen Grocery Co.,* 255 U.S. 81, 89; 65 L. Ed. 516, 520, where the Supreme Court said:

> "It follows that, in testing the operation of the Constitution upon the subject here involved, the question of the existence or nonexistence of a

> state of war becomes negligible, and we put it out of view."

The case was reversed because of the uncertainty of the text of the act the violation of which was charged, but it will be seen from the foregoing language that the decision of the lower Court is no authority for any contention urged by defendant.

The next three cases are likewise inapplicable, as they merely hold that the "termination of a war" is determined by the declaration of the properly constituted authority. The case of *Perkins v. Rogers* (35 Ind. 126, 167) involved the tolling of the statute of limitations because of the existence of the Civil War and the case of *Kneeland-Bigelow Co. v. Michigan Central Railway Co.,* 207 Mich. 546, 174 N.W. 605, involved the power of the government to control the railroads after World War I and the Court there merely held that the war had not been concluded merely by the armistice but the governmental control continued until the war had been officially terminated.

In *Palmer v. Pokorny,* 217 Mich. 284, 186 N.W. 505, the Court was dealing with the specific performance of an agreement by Pokorny to hire plaintiff as manager of a hotel "until one year after the close of the present war (same to be determined when U. S. ceases to be a party in the war, and starts to recall and disband troops)" and to give plaintiff a lease, etc. Plaintiff brought an action for a lease, upon defendant's return from the war, and it was held premature as the peace treaty had not been ratified. It

is interesting to note in the opinion, as applicable here, the Court said at page 507:

> "The armistice did not end the war; it terminated hostilities."

It will thus be seen that this case supports the position of appellant herein rather than that of appellee.

The other cases cited are opinions of the Supreme Court of the United States, and all deal with the end of the "war" as distinguished from the cessation of hostilities therein, and in practically every case this distinction is noted. The cases arising out of World War I specifically mention that the signing of the armistice did not end the war but only terminated hostilities. We agree with that position and make no contention here that the war is over. We also concede that the war will not technically be over until such termination has been properly declared. We are not interested in the end of the war because the lease is to terminate after the "cessation of hostilities in the war".

Appellee next cites the case of *Bowles v. Soverinsky,* 65 Fed. Supp. 808, decided in May of last year. This decision is not of the slightest assistance to appellee, and although not decisive, it is inferentially a strong authority for appellant's contentions. The action was one by Chester Bowles as Price Administrator for an injunction to restrain the defendants from violating maximum price regulations, and among other things the defendants pleaded that since the ending of the war the Emergency Price Control Act was no longer

in effect. The Court in its opinion spoke as follows, at page 813:

> " 'Cessation of hostilities' is not equivalent to 'end of war.' "

The Court then pointed out that the Emergency Price Control Act was effective until proclamation of the President or upon the date specified in a concurrent resolution of both Houses of Congress, whichever date was earlier, and that the Act had been continued in existence (at that time) until June 30, 1946. The Court then stated that the period of war extended to the ratification of the treaty of peace or the proclamation of peace, citing the *Hamilton* case mentioned by appellee (251 U.S. 146, 165; 64 L. Ed. 194), quoting therefrom the following statement:

> " ' "Conclusion of the war" clearly did not mean cessation of hostilities.' "

It is very apparent from this decision that the Court considered that hostilities in the case then before it had actually ceased, but that in view of the language giving life to the Act, such fact was of no consequence. By analogy, accordingly, if the instant case had been before the same Court it would have decided that hostilities having ceased on August 14, 1945, the term of the lease would have expired within six months thereafter in accordance with the specific provisions to that effect.

Next, appellee refers to the message from the President of the United States to Congress, which may be found in 1945 United States Code Congressional Serv-

ice at page 1101, et seq. Apparently appellant did not read the speech, as it is quoting an isolated statement therefrom, and if the context be considered it will clearly be seen that the President was intending by the statement cited to mean only that the time has not yet arrived for him to proclaim the cessation of hostilities, etc., and thereby terminate legislation dependent upon such proclamation. That the President really believed actual warfare had ended is evidenced by a statement which appears at page 1102, in language as follows:

> "The end of the war came more swiftly than most of us anticipated."

Preceding the statement quoted by appellee appears the following:

> "Certain of the wartime statutes which have been made effective 'in time of war', 'during the present war' or 'for the duration of the war' continue to be effective until a formal state of peace has been restored, or until some earlier termination date is made applicable by appropriate governmental action. Another group of statutes which by their provisions terminate 'upon the cessation of hostilities' or 'upon termination of the war' will in fact and in law terminate only by a formal declaration to that effect by the President or by appropriate congressional action."

It is thus apparent that President Truman, in the portion of his speech quoted by appellee, was referring to the propriety of proclaiming a cessation of hostilities and thereby ending legislation depending upon such proclamation, and was not thereby advising or

intending to advise Congress that there was in fact no cessation of hostilities. In other words, all of the special acts granting war powers to the President are effective until a "termination of war", "cessation of hostilities", etc., as declared by some proclamation or congressional act.

It is further obvious that the declaration of President Truman on December 31, 1946 as to the cessation of hostilities was purely a statement for the purpose of terminating certain legislation dependent upon such presidential proclamation. It will be noted that such declaration contains the statement "although a state of war still exists", and that such statement is exactly in accord with the position of appellant herein, namely, that the cessation of hostilities connoted the continuation of the war itself.

Appellee next attempts to criticize the decisions cited by appellant in this matter, but appellant believes that such criticism is unjustified and that a reading of said decisions will disclose their decisiveness. It is conceded that the *Kaiser* case also mentions the legislative declaration as to the termination of the war, but that is not the sole basis of the decision, and furthermore, said decision is based upon the Massachusetts case (*Scott v. Commissioner,* 272 Mass. 237, 172 N.E. 218) as to which there was no such statutory declaration.

It is accordingly respectfully submitted that the judgment of the lower Court should be reversed with instructions to decree that the lease terminated six months after August 14, 1945, and that judgment

should be entered accordingly in appellant's favor, and for attorney's fees and costs to appellant herein, in accordance with the terms of the lease.

Dated, San Francisco,
September 8, 1947.

Respectfully submitted,
THEODORE M. MONELL,
Attorney for Appellant.